

**STATE OF WISCONSIN
SUPREME COURT
Case No. 99-3297-OA**

WISCONSIN PROFESSIONAL POLICE ASSOCIATION, INC.,
JOHN CHAREWICZ, DAVID MAHONEY, SUSAN ARMAGOST,
STEVEN URSO and STATE ENGINEERING ASSOCIATION,
by its President, THOMAS H. MILLER, DAVID BUSHKOPF,
ROSS JOHNSON, MELVIN SENSENBRENNER, BERNARD KRANZ
and THOMAS H. MILLER,

Petitioners,

vs.

GEORGE LIGHTBOURN, Acting Secretary of the Wisconsin
Department of Administration, JACK C. VOIGHT,
Wisconsin State Treasurer, WISCONSIN EDUCATION ASSOCIATION
COUNSEL, by its President, TERRY CRANEY and
its Vice-President, STAN JOHNSON, and
DONALD KRAHN, MARGARET GUERTLER, GERALD MARTIN,
and PHYLLIS POPE,

Respondents.

MEMORANDUM IN SUPPORT OF THE EMPLOYE TRUST FUNDS BOARD'S
MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF

The SEA Petitioners are in receipt of Respondent,
Wisconsin Education Association Council's ("WEAC"),
letter dated August 3, 2000, and the objections filed by
Respondents George, Lightbourn, Secretary of the
Wisconsin Department of Administration, and Jack C.
Voight, Wisconsin State Treasurer (collectively,
"Administration Respondents") each opposing the Motion of

the Employee Trust Funds Board and the Department of Employee Trust Funds (collectively, "ETF") for leave to file an *amicus curiae* brief in the above-referenced matter. The SEA Petitioners believe the concerns raised by Respondents are either entirely speculative, or are concerns that apply equally to all non-parties briefs, in all cases, and do not constitute legitimate bases for challenging ETF's participation as *amicus curiae*.

The first objection raised by each of the Respondents concerns the content of the arguments they anticipate will be made by the ETF. On the one hand, WEAC asserts that the ETF should not be granted leave to file a non-party brief because "they seek to introduce new arguments ... to support their opposition to the legislation at issue," while the Administration Respondents contend that ETF's position is already fully represented by existing parties to this litigation.

The fact that the Employee Trust Funds Board may raise new arguments not raised by other parties is not a legitimate basis for objection. The whole point of having additional non-parties participate in an *amicus* role is to assure that all arguments and interests affected by the present litigation are heard. Indeed,

amicus filings would be of little value if non-parties were limited to reiterating arguments that have already been extended by the existing parties to the litigation.

The contention by the Administration Respondents that ETF's interests are identical to those of existing parties ignores the fact that the ETF would be the only participant in the present litigation representing the interests of inactive participants in the WRS. The fact that the Petitions filed in this action (and originally by ETF) bear a great deal of similarity among Petitioners does not mean that ETF's arguments will be identical to those of existing parties. Respondents, too, had a great deal of overlap in their responses to the Petitions filed herein, and each of the non-parties advocating in support of Respondents' position filed motions for leave to file an *amicus curiae* brief that were nearly identical. There is no requirement that a non-party with an interest in litigation demonstrate that its position is unique -- non-parties are simply required to demonstrate their interest in the subject matter of the litigation, and that their participation in the suit is desirable. The Administration Respondents have acknowledged that the ETF possesses "special knowledge

and expertise regarding the Wisconsin Retirement System," and it cannot be legitimately said that such special knowledge and expertise is not desirable to this court in deciding the merits of the present case. The significance of this case, reflected by the original jurisdiction taken by this Court, speaks also of the wisdom of not foreclosing a full explication of the issues.

Both WEAC and the Administration Respondents suggest that the ETF might seek to introduce new facts not contained in the record before this Court. This is a speculative concern that has already been directly answered by the ETF. The ETF will be confined to the facts contained in the record, and has acknowledged as much. If it seeks to rely on facts outside the record (or facts of which this Court cannot properly take judicial notice), it does so at its peril. No doubt, this Court has had frequent occasion to reject arguments that rely on facts that are outside of the record before it. It is not proper to exclude ETF from participating in this matter on the basis of speculation and conjecture about what ETF's brief might contain.

WEAC alone has expressed concern that it will not

be entitled to respond to ETF's non-party brief. This concern applies to all non-party briefs, in all cases.

There are currently two additional non-parties that have been granted leave to file non-party briefs supporting the Respondents in this matter. None of the Petitioners will be afforded an opportunity to respond to the briefs of these non-parties; to the extent such a response may assist this court in addressing a particular argument raised by a non-party submission, this Court certainly has the discretion and authority to request additional submissions from the parties herein.

The timeliness issue raised in WEAC's letter has been fully addressed in ETF's response dated August 4, 2000. ETF cannot be legitimately faulted for filing its Motion well in advance of the deadline provided by Wisconsin Statutes.

Finally, the Administration Respondents assert that the ETF should not be granted leave to file a non-party brief "because movants are not neutral on the issues presented in this case..." (Objections, P. 3). None of the participants in this case are "neutral," nor are they supposed to be. Both AFSCME District Council 40 and the Wisconsin Federation of Teachers, AFT, AFL-CIO have been

granted leave to file non-party amicus briefs, and each specifically stated in their motions seeking leave to file non-party briefs that they will be supporting of the position advocated by Respondents herein. Indeed, Section 809.19(7), Stats. specifically requires a party who wishes to file a non-party brief to identify their interest in the litigation.

ETF's interest in the present litigation is manifest, and permitting the ETF to file a non-party brief will not "subvert the Court's orders..." excluding ETF's participation as a party. (Objections, P. 4). To say that the ETF lacks standing to participate as a party to this litigation is one thing. To say that the fiduciaries of the trust fund must be and remain silent in the face of legislation that seeks to take assets of the Trust Fund and use them for non-trust purposes is quite another. Participation as a non-party simply requires the non-party to show (1) an interest in the outcome of the litigation; and (2) why the participation of the non-party is desirable. The broader standing principles applicable to parties do not apply to non-parties. The important legal issues involved in the present case should not be undertaken without the benefit

of ETF's unique expertise and perspective relating to the WRS. Clearly, in a case of this import and magnitude, it is desirable that the Court have the benefit of ETF's unique expertise available to it in deciding the merits of this case. It makes little sense to impose fiduciary status on the ETF while also foreclosing any ability for the fiduciary to act or speak on behalf of the beneficiaries.

None of the Respondents have articulated a legitimate basis for prohibiting ETF from filing a non-party brief in this matter. It is respectfully requested that ETF's Motion for Leave to File a Non-Party Brief should be granted.

Dated this 11th day of August, 2000.

Respectfully Submitted
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